

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE

CASCADES COMPUTER)
INNOVATION, LLC,)
)
PLAINTIFF,)

ORIGINAL

VS.)

NO. C 12-01143 YGR

RPX CORPORATION, HTC)
CORPORATION, LG ELECTRONICS,)
INC., MOTOROLA MOBILITY)
HOLDINGS, INC., SAMSUNG)
ELECTRONICS CO. LTD., DELL,)
INC.,)

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DEFENDANTS.)

OAKLAND, CALIFORNIA
TUESDAY, MAY 28, 2013

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:

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(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

PROCEEDINGS REPORTED BY ELECTRONIC/MECHANICAL STENOGRAPHY;
TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

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ALAN J. DEVLIN, ATTORNEYS AT LAW

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BY: JESSICA L. HANNAH, ATTORNEY AT LAW

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TUESDAY, MAY 28, 2013

2:03 P.M.

P R O C E E D I N G S

THE CLERK: CALLING CIVIL ACTION 12-1143, CASCADES
COMPUTER VERSUS RPX, ET AL.

COUNSEL, COME FORWARD AND STATE YOUR APPEARANCES.

MR. FINEMAN: GOOD AFTERNOON, YOUR HONOR. I'M MARTIN
FINEMAN WITH DAVIS WRIGHT TREMAINE LLP OF SAN FRANCISCO ON
BEHALF OF PLAINTIFF. AND WITH ME I WOULD LIKE TO INTRODUCE
MR. RAY NIRO OF CHICAGO, ILLINOIS. MR. NIRO IS A LONG-TIME
MEMBER OF THE BAR OF THIS COURT.

AND WE'RE HERE ON BEHALF --

MR. NIRO: GOOD AFTERNOON, YOUR HONOR.

THE COURT: GOOD AFTERNOON, GENTLEMEN.

MR. FINEMAN: ALSO WITH US IS MR. TONY BROWN, WHO IS
THE CEO OF THE PLAINTIFF HERE PRESENT IN THE COURTROOM.

THE COURT: OKAY. THANK YOU.

MR. DEVLIN: GOOD AFTERNOON, YOUR HONOR. ALAN DEVLIN
AND CHARLIE CROMPTON ON BEHALF OF DEFENDANT RPX CORPORATION.

THE COURT: OKAY. GOOD AFTERNOON.

MS. HANNAH: JESSICA HANNAH FROM KILPATRICK TOWNSEND
HERE ON BEHALF OF MOTOROLA MOBILITY.

THE COURT: HOLD ON. HOLD ON.

(PAUSE IN THE PROCEEDINGS.)

THE COURT: ARE YOU NOT ON OUR DOCKET?

MS. HANNAH: I SHOULD BE.

1 **THE CLERK:** SHE'S WAY ON THE BACK, I THINK. WAY --

2 (PAUSE IN THE PROCEEDINGS.)

3 (OFF-THE-RECORD DISCUSSION.)

4 **THE COURT:** OH, I SEE. OKAY. ALL RIGHT.

5 **MR. BOYLE:** PETER BOYLE FROM KILPATRICK TOWNSEND
6 BEHALF OF MOTOROLA MOBILITY.

7 **MR. SCARBOROUGH:** GOOD AFTERNOON, YOUR HONOR. MIKE
8 SCARBOROUGH FROM SHEPPARD MULLIN FOR DEFENDANT SAMSUNG
9 ELECTRONICS.

10 **THE COURT:** GOOD AFTERNOON.

11 **MR. JACOBSON:** YOUR HONOR, JONATHAN JACOBSON. I'M
12 HERE WITH DAN WEICK. WE'RE BOTH FROM WILSON SONSINI FOR HTC,
13 AND I'LL BE ARGUING ON BEHALF OF ALL OF THE THREE
14 MANUFACTURING DEFENDANTS.

15 **THE COURT:** OKAY. GOOD AFTERNOON.

16 ALL RIGHT. AND WHO'S ARGUING ON BEHALF OF RPX?

17 **MR. DEVLIN:** ALAN DEVLIN, YOUR HONOR.

18 **THE COURT:** I'M SORRY. COME UP TO THE MIC.

19 **MR. DEVLIN:** SORRY.

20 **THE COURT:** ALAN DEVLIN?

21 **MR. DEVLIN:** THAT'S RIGHT, YOUR HONOR. THANK YOU.

22 **THE COURT:** OKAY. AND COUNSEL FOR CASCADES? WHO'S
23 ARGUING?

24 **MR. NIRO:** RAY NIRO, YOUR HONOR, ON BEHALF OF
25 CASCADES.

1 **THE COURT:** OKAY. LET'S START WITH YOU, MR. NIRO.

2 SO CLEARLY THE COMPLAINT LOOKS SIGNIFICANTLY DIFFERENT, IN
3 MY VIEW, THAN THE ORIGINAL COMPLAINT THAT WAS FILED. I DO
4 HAVE A FEW QUESTIONS. ONE, EXPLAIN TO ME YOUR THEORY AS
5 ALLEGED IN THE COMPLAINT ON THE HORIZONTAL ALLEGATIONS.

6 RPX IS FUNDAMENTALLY DIFFERENT FROM THE MANUFACTURING
7 DEFENDANTS. SO HOW CAN THERE BE A HORIZONTAL ARRANGEMENT WITH
8 RPX?

9 **MR. NIRO:** WELL --

10 **THE COURT:** I MEAN, I UNDERSTAND IT WITH RESPECT TO
11 THE MANUFACTURING DEFENDANTS.

12 **MR. NIRO:** CORRECT.

13 **THE COURT:** I DON'T QUITE UNDERSTAND IT WITH RESPECT
14 TO RPX.

15 **MR. NIRO:** RPX HAS VERTICAL AGREEMENTS.

16 **THE COURT:** RIGHT, BUT THAT'S NOT WHAT YOU ALLEGE IN
17 THE --

18 (SIMULTANEOUS COLLOQUY.)

19 **THE COURT:** THAT'S NOT WHAT YOU ALLEGE IN THE
20 COMPLAINT. I MEAN, I GUESS YOU ALLEGE BOTH, BUT YOU ALLEGE
21 WITH RESPECT TO THE FIRST CLAIM THAT RPX SHOULD BE HELD
22 RESPONSIBLE FOR HORIZONTAL CONSPIRACY AS WELL.

23 **MR. NIRO:** CORRECT.

24 **THE COURT:** OKAY. GO AHEAD.

25 **MR. NIRO:** BECAUSE -- BECAUSE RPX, THROUGH ITS

1 VERTICAL ARRANGEMENTS, EFFECTIVELY PROVIDES TACIT AGREEMENTS
2 AMONG THE MANUFACTURING DEFENDANTS WHO, USING THIS ANALOGY OF
3 HUB AND SPOKES, THEY'RE THE HUB. THE THREE MANUFACTURING
4 DEFENDANTS AND OTHERS ARE THE -- THE -- AT THE PERIMETER OF
5 THE HUB, THE SPOKES. AND THEY KNOW THAT EACH IS ALSO -- IS
6 ALSO A MEMBER. AND BY KNOWING THAT EACH IS ALSO A MEMBER,
7 THEY CAN ENGAGE IN A TACIT AGREEMENT NOT TO DEAL.

8 THAT'S PRECISELY THE KIND OF ANALYSIS OF THE INTERSTATE
9 CASE AND OTHER CASES THAT CREATE A TACIT AGREEMENT THAT'S
10 HORIZONTAL.

11 SO YOUR HONOR'S RIGHT. THERE IS A VERTICAL ARRANGEMENT,
12 BUT IT CAN, IN FACT, BE HORIZONTAL BECAUSE OF THE ARRANGEMENT
13 WITH THE -- WITH THE SPOKES KNOWING THAT THEY'RE MEMBERS.

14 **THE COURT:** ALL RIGHT. BUT JUST TO -- IF I WANTED TO
15 HAVE -- I'M GOING TO SEE THESE AGAIN ON SUMMARY JUDGMENT IF IT
16 GOES THROUGH. RIGHT?

17 **MR. NIRO:** RIGHT.

18 **THE COURT:** AND WE DON'T HAVE KIND OF A
19 QUASI-HORIZONTAL/QUASI-VERTICAL COMBINATION. I MEAN,
20 TYPICALLY, WE WOULD HAVE ONE OR THE OTHER.

21 ARE YOU SAYING THAT IF THERE -- I MEAN, ISN'T ONE GOOD
22 ENOUGH? THAT IS, WHY DO YOU HAVE TO HAVE BOTH?

23 **MR. NIRO:** WELL, ONE CAN BE GOOD ENOUGH. THE REASON
24 FOR BOTH IS THAT RPX REALLY IS THE FACILITATOR OF THE
25 COMBINATION. RPX PROMOTES THE FACT THAT ITS GOAL IS TO CREATE

1 A BUYER CARTEL TO NEGOTIATE LICENSES WITH THE PURPOSE OF
2 DRIVING THE PRICE DOWN. ON ITS FACE, THERE'S NOTHING WRONG
3 WITH THAT UNLESS THERE'S A CONSPIRACY THAT IS EFFECTUATED, AND
4 THAT'S, IN FACT, WHAT HAPPENED HERE, YOUR HONOR.

5 TWO THINGS OF SIGNIFICANCE FACTUALLY. NUMBER ONE,
6 MOTOROLA SAID WE'RE NOT GOING TO DEAL WITH ANYONE EXCEPT RPX,
7 AND THAT'S A NEW ALLEGATION IN THE PLEADING.

8 **THE COURT:** RIGHT. I SAW THAT.

9 **MR. NIRO:** AND SECONDLY, MR. BARHYDT WHO ACTS ON
10 BEHALF OF AND ACTED ON BEHALF OF RPX SAID THAT THIS GROUP IS
11 WORKING TOGETHER TO SET THE PRICE, TO DETERMINE WHAT THE
12 AMOUNT WILL BE, TO DETERMINE THE NUMBER OF PATENTS, FOR
13 EXAMPLE, THAT WOULD BE LICENSED, NOT JUST THE '750, BUT ALL,
14 IS WHAT THEY WANTED. AND --

15 **THE COURT:** HOW COULD -- HOW COULD ONE EVER DETERMINE
16 WHAT A MARKET RATE IS WHEN THERE IS -- WHEN IT IS A UNIQUE
17 LICENSE? THERE IS NO COMPARISON SO -- SO HOW DO WE HAVE --
18 WHY -- WHAT TURNS THIS INTO A MARKET VIOLATION AS OPPOSED TO
19 AN INDEPENDENT CONTRACTUAL DISPUTE?

20 **MR. NIRO:** WELL, THE FACT OF AN AGREEMENT NOT TO DEAL
21 TURNS IT INTO -- TO THE --

22 **THE COURT:** I WANT YOU TO FOCUS ON THE MARKET.

23 **MR. NIRO:** OKAY.

24 **THE COURT:** BECAUSE -- BECAUSE FOR -- THE '750
25 PATENT.

1 **MR. NIRO:** YES.

2 **THE COURT:** THERE IS NO OTHER '750 PATENT.

3 **MR. NIRO:** CORRECT.

4 **THE COURT:** THERE IS NO PRICE THAT CAN BE -- I'M
5 TRYING TO UNDERSTAND HOW ONE GETS A MARKET PRICE. YOU MAKE --
6 YOU ALLEGE IN YOUR COMPLAINT THAT IT IS BELOW MARKET.

7 **MR. NIRO:** RIGHT.

8 **THE COURT:** BUT HOW IS THERE A MARKET?

9 **MR. NIRO:** WELL --

10 **THE COURT:** HOW CAN I EVER DEFINE THAT? HOW COULD
11 ANYONE EVER DEFINE IT?

12 (SIMULTANEOUS COLLOQUY.)

13 **MR. NIRO:** YOU CAN DEFINE IT IF THE NATURAL FORCES OF
14 NEGOTIATION TAKE PLACE. IN EVERY NEGOTIATION FOR A LICENSE,
15 THERE IS A PRICE THAT WILL BE ESTABLISHED BY THE MARKETPLACE,
16 AND THAT'S A MATTER OF THE NEGOTIATION BETWEEN THE PATENT
17 OWNER AND THE POTENTIAL LICENSEES.

18 PATENT OWNER MAY SAY, WELL, THE PRICE HAS GOT TO BE THERE.
19 THE -- THE LICENSEES MAY SAY, NO, I'LL PAY A DIFFERENT PRICE.
20 BUT WHATEVER -- AS LONG AS THEY'RE FREELY NEGOTIATING,
21 ULTIMATELY, THERE WILL BE SOME PRICE.

22 **THE COURT:** AND HOW CAN IT BE FREE NEGOTIATION WHEN
23 ALL OF THESE CASES SEEM TO GET POSTURED IN THE CONTEXT OF A --
24 OF A PATENT SUIT BEING FILED? HOW IS THAT FREE NEGOTIATION?

25 **MR. NIRO:** WELL, YOU DON'T ALWAYS HAVE A PATENT SUIT.

1 **THE COURT:** BUT WE HAD ONE HERE.

2 **MR. NIRO:** -- EVEN WITH A --

3 **THE COURT:** WE CERTAINLY HAVE IT HERE.

4 **MR. NIRO:** THAT'S RIGHT. AND MOST PATENT SUITS,
5 INDEED 93 PERCENT OR MORE GET SETTLED; THAT IS, THE PARTIES
6 REACH AN AGREEMENT. IF THE MATTER ISN'T RESOLVED BEFORE
7 TRIAL, THEY REACH AN AGREEMENT TO SETTLE THROUGH A LICENSE.
8 AND THE NATURAL FORCES OF THE COMPETITIVE MARKETPLACE
9 ESTABLISH WHAT THAT AMOUNT WILL BE.

10 ONCE ONE PARTY AGREES TO A LICENSE AMOUNT, THAT PRETTY
11 MUCH DETERMINES WHAT THE OTHERS WILL PAY. IT'S NOT -- IT
12 DOESN'T HAVE TO BE THAT, BUT IN GENERAL IT IS THAT, BECAUSE
13 THE COMPETITIVE ASPECTS OF THIS BEING WHAT THEY ARE, THAT
14 BECOMES AN ESTABLISHED ROYALTY. AND MOST FREQUENTLY, THAT IS
15 WHAT THE AMOUNT WILL BE.

16 HERE, THERE WAS NO NEGOTIATION. THE COMBINATION, THE
17 CONSPIRACY PREVENTED NEGOTIATION. AND IT WAS ALL PART OF WHAT
18 RPX SAYS IS THEIR ABILITY TO COMBINE GROUPS OF BUYERS INTO IS
19 A CARTEL FOR THE PURPOSE OF PREVENTING THAT NEGOTIATION. AND
20 THAT'S WHAT HAPPENS.

21 IF THE NATURAL FORCES OF GIVE AND TAKE IN NEGOTIATION HAD
22 TAKEN PLACE, THERE WOULD BE A PRICE. I CAN'T SAY TO THE COURT
23 WHAT THAT IS. I KNOW WHAT OUR CLIENT THINKS IT SHOULD BE.
24 THE QUESTION WOULD BE WHAT WOULD -- IN A FREE MARKET, WHAT
25 WOULD THE DEFENDANTS HAVE AGREED TO.

1 **THE COURT:** ALL RIGHT. WHY DON'T YOU STAY THERE.
2 I'LL HEAR FROM THE RPX LAWYER ON THAT TOPIC.

3 **MR. DEVLIN:** THANK YOU VERY MUCH, YOUR HONOR.

4 AND MY DISTINGUISHED OPPOSING COUNSEL SUGGESTED THERE WAS
5 NO NEGOTIATION.

6 **THE COURT:** YOU'RE GOING TO NEED TO SPEAK UP
7 MR. DEVLIN.

8 **MR. DEVLIN:** CERTAINLY. MY DISTINGUISHED OPPOSING
9 COUNSEL ARGUED THAT THERE WAS NO NEGOTIATION WHEN OF COURSE WE
10 KNOW FROM AMENDED COMPLAINTS AND THE ORIGINAL COMPLAINT THAT
11 THAT'S NOT TRUE. RPX AND CASCADES NEGOTIATED. CASCADES HAS
12 ALLEGED THAT RPX MADE AN OFFER. WE NOW KNOW FROM PARAGRAPH 42
13 OF THE AMENDED COMPLAINT THAT NO LESS THAN TWO RPX MEMBERS
14 HAVE INDIVIDUALLY AND SEPARATE AND APART FROM RPX NEGOTIATED
15 LICENSES WITH CASCADES.

16 **THE COURT:** RIGHT. BUT THEY'RE SMALL PLAYERS. IF I
17 TAKE, WHICH I WILL AND I MUST, EVERYTHING IN THE COMPLAINT TO
18 BE TRUE FOR PURPOSES OF A 12(B)(6), WHICH MAY NOT END UP BEING
19 TRUE BUT FOR PURPOSES OF THESE PROCEEDINGS, I'M ASSUMING
20 THEY'RE TRUE, THOSE ARE MINOR PLAYERS WHO DON'T REALLY HAVE AN
21 IMPACT OR DON'T REALLY CONTROL THAT PARTICULAR MARKET AS I
22 UNDERSTAND IT, CORRECT?

23 **MR. NIRO:** THAT'S CORRECT, YOUR HONOR. LG HAD A 4
24 PERCENT MARKET SHARE. PHILLIPS WAS ESSENTIALLY A 0 PERCENT
25 MARKET SHARE. THEY WERE JUST ENTERING. AT 4 PERCENT MARKET

1 SHARE, THEY PAID 800,000, WHICH WOULD EXTRAPOLATE OUT INTO 20
2 MILLION FOR ALL OF THEM.

3 THAT DOESN'T MEAN THAT THAT'S WHAT THE BOTTOM LINE WOULD
4 BE, BUT THAT'S AN INDICATION OF WHAT WOULD BE NEGOTIATED IN
5 ALL LIKELIHOOD HAD THE MARKETPLACE PERMITTED IT.

6 **MR. DEVLIN:** YOUR HONOR, MAY I --

7 **THE COURT:** YOU MAY ADDRESS THAT.

8 **MR. DEVLIN:** THANK YOU VERY MUCH.

9 PLAINTIFFS' THEORY HERE IS THAT THERE WAS AN OVERARCHING
10 CONSPIRACY BETWEEN RPX AND THE MANUFACTURING DEFENDANTS --
11 THAT IS, RPX MEMBERS -- NOT TO DEAL WITH CASCADES EXCEPT
12 THROUGH RPX. IN PARAGRAPH 20, THEY ADMIT THAT THE MEMBERSHIP
13 AGREEMENTS LEAVE EACH MEMBER FREE TO NEGOTIATE.

14 **THE COURT:** LET'S -- YOU KNOW WHAT? DOES IT
15 MATTER --

16 **MR. DEVLIN:** WELL --

17 **THE COURT:** -- IF THERE'S ONLY THREE? I MEAN, DOES
18 THE CONSPIRACY HAVE TO HAVE ALL HUNDRED AND TEN MEMBERS OF
19 RPX? CAN WE NOT HAVE A CONSPIRACY WITH A PORTION?

20 **MR. DEVLIN:** YOUR HONOR, THE QUESTION IS ONE OF
21 PLAUSIBILITY. IT'S A QUESTION OF TWOMBLY POINTING OUT, IS
22 THERE AN OBVIOUS ALTERNATIVE EXPLANATION. FOR EXAMPLE --

23 **THE COURT:** FOR THE FACT THAT YOU WANT TO BRING THE
24 PRICE DOWN?

25 **MR. DEVLIN:** NO.

1 **THE COURT:** IF I LOOK AT THEIR COMPLAINT, THAT SEEMS
2 PLAUSIBLE, DOESN'T IT?

3 **MR. DEVLIN:** YOUR HONOR, THERE'S AN IMPORTANT
4 DISTINCTION BETWEEN CONCLUSIONS AND ALLEGED FACTS. AND THE
5 ALLEGED FACTS HERE PAINT A STORY OF HIGHLY DISSIMILAR BEHAVIOR
6 IN THE PRIOR COMPLAINT. IN PARAGRAPH 36, THERE WAS AN
7 ALLEGATION THAT DELL AND PANTECH BOTH INDIVIDUALLY OF RPX MADE
8 OFFERS. SO THIS IS A WHITTILING AWAY CONSPIRACY. YOU'RE ONLY
9 IN THE CONSPIRACY IF YOU HAVEN'T SETTLED WITH CASCADES WHICH
10 HAS SUED YOU FOR PATENT INFRINGEMENT.

11 IF THAT THEORY IS CORRECT, ANY PATENTEE SUING A GROUP, TWO
12 OR MORE, AT COMPANIES FOR PATENT INFRINGEMENT THAT MADE AN
13 OFFER THAT THOSE DEFENDANTS THEREAFTER DECLINED -- IF HIS
14 THEORY IS CORRECT, THEN YOU WOULD HAVE A PLAUSIBLE ANTITRUST
15 CLAIM. THAT JUST CAN'T BE CORRECT.

16 AND HERE, WHEN YOU LOOK AT THE ALLEGED FACTS AS DISTINCT
17 FROM THE LEGAL CONCLUSIONS ATTACHED TO THEM, YOU SEE HIGHLY
18 DISSIMILAR BEHAVIOR. AT PARAGRAPHS 50 AND 51, THEY TALK ABOUT
19 PARALLEL BEHAVIOR. THEY TALK ABOUT UNIFORMITY OF ACTION
20 DEMONSTRATES AN ORGANIZED EFFORT NOT TO DEAL.

21 THERE IS NO PARALLEL BEHAVIOR. YOU'VE GOT THREE
22 MANUFACTURING DEFENDANTS THAT HAVE DECIDED TO LITIGATE, AND
23 RPX MADE AN OFFER, AND WE KNOW THAT NO LESS THAN FOUR RPX
24 MEMBERS HAVE INDEPENDENTLY OF RPX EITHER REACHED TERMS WITH
25 CASCADES OR MADE OFFERS.

1 NOW, THE POINT ABOUT WHETHER THEY'RE SMALL OR MAJOR
2 PLAYERS IS LARGELY BESIDES THE POINT BECAUSE THAT IF --

3 **THE COURT:** WELL, NOT NECESSARILY. I KNOW YOU'D LIKE
4 ME TO THINK THAT, BUT GO AHEAD.

5 **MR. DEVLIN:** WELL, THE QUESTION IS ONE OF OVERARCHING
6 CONSPIRACY. THE ALLEGED CONSPIRACY HERE IS NOT THAT THREE
7 MANUFACTURING DEFENDANTS HAVE AGREED, YOU KNOW, NOT TO DEAL
8 WITH CASCADES EXCEPT THROUGH RPX. AND IT'S A CONTINUALLY
9 WHITTLED NUMBER.

10 **THE COURT:** IT'S NOT THE QUESTION OF THE FUNDAMENTAL
11 NUMBER. IT'S THE QUESTION OF HOW MUCH OF THE MARKET THEY
12 CONTROL. AS I UNDERSTAND THE COMPLAINT AS IT IS NOW ALLEGED,
13 IT'S OVER 50 PERCENT OF THE MARKET. IS THAT NOT RIGHT?

14 **MR. DEVLIN:** WELL, IT DEPENDS WHICH MARKET YOU'RE
15 REFERRING TO. I MEAN, THERE ARE HUGE PROBLEMS WITH THE
16 RELEVANT MARKET THAT'S BEEN ALLEGED IN THIS CASE. AND -- BUT
17 SOMEWHAT CONFUSEDLY, THE AMENDED COMPLAINT TALKS ABOUT, YOU
18 KNOW, MARKETS OTHER THAN FOR THE LICENSING OF INTELLECTUAL
19 PROPERTY.

20 NOW, IF YOU ACCEPT THE IMPLAUSIBLE AND COUNTER-FACTUAL
21 RELEVANT MARKET ALLEGED IN THE COMPLAINT, YOU KNOW, I COULD
22 SEE HOW YOU COULD FOLLOW TO THAT LEVEL. BUT IF YOU LOOK AT
23 THE MARKET AS ALLEGED ITSELF, THERE ARE HUGE PROBLEMS WITH IT.

24 THEY TRY TO LIMIT IT JUST TO THE MANUFACTURERS OF MOBILE
25 PHONES AND TABLETS USING ANDROID OPERATING SYSTEMS. WHEN

1 THEY'VE ALSO ALLEGED THAT THEY'VE SOLD PROPERTY RIGHTS,
2 PATENTS, AND TO AT LEAST TWO COMPANIES OR ONE COMPANY --
3 EXCUSE ME -- TO -- TO PHILLIPS WITH 0 PERCENT MARKET SHARE.

4 AND THEY ALSO ADMIT TO HAVING MADE AN OFFER TO HYNIX,
5 WHICH THEY ADMIT, AS THEY MUST IN OPPOSITION, AND DOES NOT
6 MANUFACTURE ANYTHING WITH AN ANDROID. SO WHAT WE HAVE HERE IS
7 AN ARTIFICIAL MARKET DRAWN TO CREATE A LAWSUIT AND TO CREATE,
8 YOU KNOW, A CLAIM OF MONOPSYZATION (PHONETIC), AND --

9 **THE COURT:** I UNDERSTAND THAT THERE ARE ISSUES ON
10 BOTH SIDES. IT DOES CONTINUE TO APPEAR TO ME, ALTHOUGH I
11 THINK IT IS MORE CLEAR NOW THAN IT WAS BEFORE, THAT CASCADES
12 IS FUNDAMENTALLY ATTACKING THE NATURE OF THIS STRUCTURE THAT
13 RPX HAS PUT TOGETHER, WHICH IS TO -- AND THEY ARE ALLEGING
14 THAT RPX IS KIND OF THE LYNCHPIN IN TERMS OF CREATING
15 COLLUSIVE BEHAVIOR BETWEEN BUYERS OF PARTICULAR PATENT
16 LICENSES AND THIS ONE, THE '750 AND ITS -- AND ITS RELATED
17 PATENTS, AND THAT THAT PARTICULAR MODEL OF OPERATING IS -- YOU
18 KNOW, VIOLATES THE SHERMAN ACT.

19 **MR. DEVLIN:** WELL, YOUR HONOR, I'VE NEVER HEARD OF A
20 LAWSUIT FOUNDED ONLY ON A BUSINESS MODEL ITSELF AS DISTINCT
21 FROM PRACTICES AND CONSTITUTES AN ANTITRUST VIOLATION.

22 THE QUESTION IS WHETHER ANYTHING RPX UNILATERALLY OR IN
23 CONJUNCTION WITH ITS MEMBERS HAS DONE THAT CONSTITUTES AN
24 ANTITRUST VIOLATION.

25 **THE COURT:** WELL, THAT'S -- I MEAN, THEY'RE ALLEGING,

1 AS I UNDERSTAND IT, THAT -- THAT YOU STOPPED -- THAT RPX
2 STOPPED THE MANUFACTURING DEFENDANTS AND/OR THAT THE
3 MANUFACTURING DEFENDANTS ON THEIR OWN AGREED THAT THEY WEREN'T
4 GOING TO NEGOTIATE INDEPENDENTLY OR AT LEAST THESE THREE
5 PARTICULAR ONES THAT SEEM TO HAVE A SUBSTANTIAL PART OF THE
6 MARKET FOR THEIR PARTICULAR PRODUCT.

7 **MR. DEVLIN:** WELL, YOUR HONOR, I UNDERSTAND YOUR
8 CONCERN, BUT I DIRECT YOU TO PARAGRAPH 34 OF THE AMENDED
9 COMPLAINT WHERE KEVIN BARHYDT ON BEHALF OF RPX EXPLAINS RPX IS
10 NOT IN A POSITION WHERE IT CAN PAY MORE FOR SOMETHING THAN
11 WHAT ITS CLIENTS VALUE IT AT. CASCADES TRIED TO PAINT THAT IN
12 NEGATIVE TERMS. THAT'S SIMPLY A STATEMENT --

13 **THE COURT:** BUT REMEMBER, WE'RE AT A 12(B)(6).

14 (SIMULTANEOUS COLLOQUY.)

15 **THE COURT:** RIGHT. AND SO I HAVE TO ASSUME THAT --
16 NOT ONLY THAT IT'S TRUE BUT THAT ALL INFERENCES ARE IN THEIR
17 FAVOR.

18 **MR. DEVLIN:** NOT QUITE, YOUR HONOR. ALL REASONABLE
19 INFERENCES. I MEAN, THEY TRY --

20 **THE COURT:** I'M ALWAYS REASONABLE.

21 **MR. DEVLIN:** OF COURSE, YOUR HONOR. AS WE ALL ARE, I
22 HOPE.

23 AND -- BUT THE PRIMARY WORD THAT CASCADE (SIC) SEEMS TO
24 USE TO VAULT THIS INTO SOME KIND OF NEFARIOUS ACTIVITY IS
25 "WHOLESALE." AND IF THAT THEORY IS TRUE, COSTCO WOULD BE

1 ILLEGAL BECAUSE PEOPLE WOULD BE -- YOU KNOW, ENTER INTO
2 MEMBERSHIP AGREEMENTS TO GET DISCOUNTED PRICES. IT'S NOT A
3 REASONABLE INFERENCE IN THE WORD "WHOLESALE" THAT IT'S AN
4 INVITATION TO JOIN A BUYER SIDE (SIC) CARTEL.

5 IT'S UNDISPUTED -- I MEAN, PARAGRAPH 2 OF THE AMENDED
6 COMPLAINT DIRECTLY POINTS OUT THAT RPX HAS OVER 120 MEMBERS.
7 IT'S 140 NOW. AND A PATENTEE WISHING TO LICENSE ITS
8 INTELLECTUAL PROPERTY AND ENJOYS GREAT CONVENIENCE IN GOING TO
9 A ONE-STOP SHOP, WHERE IT CAN GO TO RPX AND IN ONE NEGOTIATION
10 SETTING, LICENSE A LARGE NUMBER OF PEOPLE.

11 IT'S -- IT'S -- YOU KNOW, IT GOES BEYOND THE REALM OF
12 REASONABLE INFERENCES TO SUGGEST THAT COMES DOWN TO SOME
13 CONSPIRACY AS OPPOSED TO SIMPLY, YOU KNOW, A VOLUME DISCOUNT,
14 WHICH ARE UBIQUITOUS AND EFFICIENT.

15 AND WHEN YOU LOOK AT WHAT'S ACTUALLY BEEN ALLEGED HERE,
16 YOUR HONOR, THIS IS NOT A CASE WHERE IT'S ALLEGED THAT RPX
17 AGREES WITH EACH OF ITS MEMBERS IN THE CONTRACT THAT THEY WILL
18 NOT DEAL INDEPENDENT OF RPX. IF THAT WERE THE CASE, THEN
19 YOU'D HAVE SPOKES. YOU'D HAVE RESTRICTIONS.

20 CASCADES IN ITS OPPOSITION REPEATEDLY REFERS, OFTEN IN
21 BOLD AND ITALICS, TO ACTUAL AGREEMENTS BY WHICH I UNDERSTAND
22 THEY'RE REFERRING TO MEMBERSHIP AGREEMENTS. BUT THOSE
23 MEMBERSHIP AGREEMENTS SAY ABSOLUTELY NOTHING ABOUT -- PROHIBIT
24 COMPANIES FROM INDEPENDENTLY DEALING.

25 AND WHEN YOU COUPLE THAT AND -- WITH AS WE EXPLAINED IN

1 OUR BRIEF AND I'D BE HAPPY TO TALK ABOUT NOW IF YOU'D LIKE,
2 AND HOW THE FACTS DRAWING ALL REASONABLE INFERENCES IN
3 CASCADES FAVOR DO NOT, AS MONSANTO SAID IN 1994 IN THE
4 SUPREME COURT OPINION, TEND TO EXCLUDE THE POSSIBILITY OF
5 INDEPENDENT CONDUCT.

6 AS IQBAL POINTED OUT, BEHAVIOR THAT IS NOT ONLY CONSISTENT
7 WITH BUT MORE LIKELY EXPLAINED BY LAWFUL UNCHOREOGRAPHED FREE
8 MARKET BEHAVIOR FAILS TO STATE A CLAIM AS A MATTER OF LAW.

9 AND WHAT CASCADES HAS ALLEGED HERE, TAKING ALL THOSE FACTS
10 AS TRUE, IS MEMBERSHIP AGREEMENTS THAT DO NOT RESTRICT FREE
11 BARGAINING, NO LESS THAN FOUR RPX MEMBERS INDIVIDUALLY
12 BARGAINING, AND ALL YOU'RE LEFT WITH IS THIS IDEA THAT -- YOU
13 KNOW, THE FACT THAT RPX OFFERS A SERVICE WHERE YOU CAN
14 NEGOTIATE WITH RPX OR GO TO ONE OF ITS MEMBERS, WHICH CASCADES
15 HAS DONE, AND THEY TRY TO DRAW THE INFERENCE OF CONSPIRACY.

16 YOUR HONOR, THERE'S -- THERE'S NO HOOK ON WHICH TO HANG A
17 PLAUSIBLE COMPLAINT.

18 **THE COURT:** COUNSEL?

19 **MR. NIRO:** YOUR HONOR, FIRST OF ALL, IT'S 90 PERCENT,
20 NOT 50, OF THE CELL PHONE MARKET, THE ANDROID CELL PHONE
21 MARKET, THAT'S CONTROLLED BY THESE THREE MANUFACTURING
22 DEFENDANTS, SAMSUNG, MOTOROLA AND HTC. IF YOU THROW TABLETS
23 IN, IT'S MORE THAN 70 PERCENT. AND THE NATURE OF THE
24 AGREEMENTS IS NOT JUST THE VERTICAL AGREEMENT. THERE ARE
25 HORIZONTAL AGREEMENTS THAT RPX ADMITS IN ITS OWN S.E.C.

1 FILINGS.

2 ON -- IN PARAGRAPH 21, FOR EXAMPLE, THEY SAY THAT
3 SYNDICATED ACQUISITIONS, WHERE YOU GET A SUBSET OF THE
4 100-PLUS MEMBERS -- IN THIS CASE, 3 -- AND IT SAYS THEY
5 COLLECT MONEY FROM THEM AS EACH RESPECTIVE CLIENT HAS A
6 CONTRACTUALLY BINDING OBLIGATION. AND IN MANY INSTANCES, WE
7 COLLECT THE CLIENT CONTRIBUTION PRIOR TO MAKING A PAYMENT TO
8 THE SELLER.

9 SO THEY'RE SAYING THAT THEY HAVE, IN ADDITION TO THESE
10 VERTICAL AGREEMENTS, EFFECTUATED HORIZONTAL AGREEMENTS THROUGH
11 THE MANUFACTURING DEFENDANTS THAT THEY GO TO FOR THE PURPOSE
12 OF RAISING MONEY NECESSARY TO GO OUT AND ACQUIRE SYNDICATED
13 DEALS.

14 SO THERE'S -- THERE'S A LITTLE MORE COMPLEXITY IN DETAIL
15 TO THEIR ARRANGEMENT THAN JUST THESE SUBSCRIPTION AGREEMENTS,
16 AS THEY ADMIT.

17 **MR. DEVLIN:** YOUR HONOR, THAT DOES NOT AMOUNT TO A
18 HORIZONTAL RESTRAINT OF TRADE BY ANY STRETCH OF THE
19 IMAGINATION.

20 **THE COURT:** I SEE YOU. KEEP YOUR HAND DOWN. I'LL
21 GET TO YOU.

22 GO AHEAD.

23 **MR. DEVLIN:** OH, I -- I WAS GOING TO -- WELL, I JUST
24 MADE MY POINT, BUT I WAS ALSO GOING TO MENTION, I BELIEVE THE
25 MANUFACTURING DEFENDANTS' COUNSEL WOULD BE EAGER TO ADDRESS

1 THAT POINT AS WELL.

2 **THE COURT:** I'LL GET TO HIM.

3 **MR. DEVLIN:** VERY GOOD, YOUR HONOR.

4 **THE COURT:** YOU BETTER REPEAT YOUR POINT, THOUGH,
5 BECAUSE I WAS -- HE WAS DISTRACTING ME OUT OF THE CORNER OF MY
6 EYE.

7 **MR. DEVLIN:** NO PROBLEM. HORIZONTALLY, NOTHING IN
8 THOSE MATERIALS IS PLAUSIBLY SUGGESTIVE OF A HORIZONTAL
9 RESTRAINT OF TRADE.

10 THERE'S A VERY IMPORTANT THING HERE. THE FACT THAT YOU
11 CONTRACT WITH SOMEONE DOESN'T CREATE A HORIZONTAL AGREEMENT.
12 AND MY DISTINGUISHED OPPOSING COUNSEL EARLIER TRIED TO SUGGEST
13 THAT THERE'S HORIZONTALITY BECAUSE OF SOME HUB AND SPOKE. BUT
14 THAT MISUNDERSTANDS THE NATURE OF HUB AND SPOKES. SPOKES ARE
15 VERTICAL RESTRAINTS.

16 **THE COURT:** BUT WHY DID RPX IN ITS S.E.C.
17 REGISTRATION STATEMENT AT PARAGRAPH 29 TALK ABOUT THE
18 POSSIBILITY THAT COURTS MIGHT INTERPRET THEIR CONDUCT AS
19 VIOLATING ANTITRUST LAWS.

20 **MR. DEVLIN:** I'M GLAD YOU ASKED THAT, YOUR HONOR.
21 AND THEY ALSO TALK ABOUT WAR AND NATURAL DISASTERS AND --

22 **THE COURT:** THAT'S THE -- THAT'S THE ARGUMENT YOU
23 WANT TO MAKE?

24 **MR. DEVLIN:** NO, YOUR HONOR. I WANT TO MAKE THIS
25 VERY CLEAR. WE LIVE IN A WORLD OF -- WHERE ANYTHING IS

1 MATHEMATICALLY POSSIBLE. ANYTHING. AND THE IDEA THAT YOU
2 WOULD DISCLOSE IN AN S.E.C. FILING ANY CONCEIVABLE RISK YOU
3 COULD THINK OF. AND IT IS POSSIBLE THAT AS A MATTER OF
4 MATHEMATICAL POSSIBILITY, THAT SOME COURT AT SOME STAGE COULD
5 TAKE THAT VIEW AND HENCE THE REASON FOR THAT.

6 BUT THAT'S NOT THE QUESTION FOR THE COURT TODAY. THE
7 COURT -- THE COURT'S QUESTION TODAY IS ONE OF PLAUSIBILITY.
8 IT'S A QUESTION OF INDEPENDENT BEHAVIOR. AND IT'S A QUESTION
9 OF WHETHER THERE'S AN -- AN OBVIOUS ALTERNATIVE EXPLANATION.

10 **THE COURT:** WELL, IT WAS INTERESTING TO ME IN THE
11 FIRST GO-AROUND OF THIS COMPLAINT -- I WAS OBVIOUSLY VERY
12 CONCERNED, AND I'M STILL CONCERNED AT THE TIMING OF IT. BUT
13 IT IS A NEW FACT OR, AT LEAST AS IT'S ALLEGED, THAT RPX ITSELF
14 WENT SEEKING PURCHASE OF THESE PATENTS, WHICH MEANS THAT THEY
15 MUST HAVE SOME VALUE TO RPX.

16 **MR. DEVLIN:** WELL, YOUR HONOR, IF YOU TAKE --

17 **THE COURT:** THAT IT'S NOT NECESSARILY JUST TRYING TO
18 GET OUT OF PATENT LITIGATION BY PAYING SOME NUISANCE VALUE.
19 RPX SOUGHT THESE PATENTS.

20 **MR. DEVLIN:** WELL, TAKING THAT FACT ALLEGED AS TRUE,
21 THAT ACTUALLY DISPROVES THEIR COMPLAINT.

22 **THE COURT:** AND WHY IS THAT?

23 **MR. DEVLIN:** BECAUSE THE FACTS THAT THEY ALLEGE THAT
24 RPX MADE A LESS THAN \$10 MILLION OFFER ON BEHALF OF ITS MORE
25 THAN A HUNDRED MEMBERS FOR THE BENEFIT OF MORE THAN A HUNDRED

1 MEMBERS AND THAT, ACCORDING TO THE COMPLAINT, THAT AMOUNT
2 CONSTITUTED A RECOGNITION OF VALIDITY AND VALUE OF THE
3 PATENTS.

4 AND THEN WHAT CASCADES TRIES TO DO IS TO CREATE A
5 PLAUSIBLE INFERENCE OF CONSPIRACY BASED ON ACTION CONTRARY TO
6 SELF INTEREST BY SAYING THAT MANUFACTURING DEFENDANTS FAILED
7 TO TAKE A LICENSE THAT WOULD AMOUNT TO 12.5 MILLION, WHICH
8 WOULD BE MORE THAN THE RPX OFFER.

9 I MEAN, THIS IS, AS YOU POINTED OUT QUITE ASTUTELY
10 EARLIER, COMES DOWN TO THE QUESTION OF MARKET VALUE AND WHAT
11 THAT MEANS. WHAT IT MEANS IS NEGOTIATING IN A MARKET FOR AN
12 AMOUNT. AND WHEN RPX SAYS THAT WE'RE NOT IN A POSITION TO PAY
13 SOMETHING FOR MORE THAN WHAT OUR CLIENTS VALUE IT AT, ALL
14 THAT'S TELLING YOU IS THAT THIS ISN'T A GOOD VALUE
15 PROPOSITION.

16 **THE COURT:** OR IT COULD TELL THAT I'VE TALKED TO MY
17 CLIENTS, AND THEY'RE NOT WILLING TO PAY THIS PRICE, AND WE'VE
18 HAD THESE MEETINGS, AND I'M ACTING ON THEIR BEHALF BECAUSE
19 THERE'S ALL OF THESE OTHER THINGS GOING ON BEHIND CLOSED
20 DOORS.

21 IT COULD ALSO TELL ME THAT.

22 **MR. DEVLIN:** WELL, WHAT YOUR HONOR SAYS AND -- WOULD
23 HAVE WEIGHT IN THE WORLD IN WHICH WE DIDN'T HAVE ADMISSIONS
24 THAT AT LEAST 4 RPX MEMBERS HAVE, IN FACT, INDEPENDENTLY
25 MOVED. I MEAN, THE NATURE OF ALLEGATION --

1 **THE COURT:** BUT WE HAVE -- NO, I HAVE NOT A SINGLE
2 MEMBER THAT HAS MOVED WHO HAS A SIGNIFICANT INTEREST IN THESE
3 PATENTS.

4 **MR. DEVLIN:** WELL, YOUR HONOR --

5 **THE COURT:** RIGHT? AM I WRONG? AM I WRONG? HAVE
6 ANY OF THE DEFENDANTS WHO HAVE TRIED TO GET OUT OF WHAT IS
7 ALWAYS VERY COSTLY LITIGATION -- HOW MANY LAWYERS DO I HAVE
8 HERE TODAY? SIX, EIGHT, TEN?

9 HAVE ANY OF THEM HAD ANY SIGNIFICANT INTEREST IN THESE
10 PATENTS?

11 **MR. DEVLIN:** WELL, YOUR HONOR --

12 **THE COURT:** UNLESS I'M MISSING SOMETHING.

13 **MR. DEVLIN:** WELL, I'M NOT ENTIRELY SURE WHAT
14 "SIGNIFICANT" MEANS.

15 **THE COURT:** LET'S SAY -- HOW ABOUT MORE THAN 10
16 PERCENT? MORE THAN -- IT'S PRETTY MINIMAL.

17 **MR. DEVLIN:** WELL, THAT ASSUMES, BY THE WAY, THAT
18 MARKET DEFENSE IS TRUE TO LIMIT IT TO ANDROIDS, WHICH WE KNOW
19 CANNOT BE TRUE FROM THE FACTS ALLEGED IN THE COMPLAINT ABOUT
20 PANTECH AND ABOUT -- AND ABOUT PHILLIPS WITH ZERO PERCENT
21 SHARE. THAT JUST DOESN'T FOLLOW.

22 **THE COURT:** AND I UNDERSTAND ZERO PERCENT SHARE TO BE
23 SOMETHING LESS THAN POINT ONE BUT MORE THAN --

24 **MR. NIRO:** IT'S LESS THAN ONE. I THINK PHILLIPS,
25 WHICH WAS JUST LAUNCHING ITS PRODUCT LINE, HAD 50,000 PHONES.

1 **THE COURT:** ALL RIGHT.

2 **MR. NIRO:** SO IT WAS --

3 **THE COURT:** COUNSEL FOR THE MANUFACTURING DEFENDANTS?

4 **MR. DEVLIN:** THANK YOU, YOUR HONOR.

5 **THE COURT:** AND I CAN SEE YOU. MY CHILDREN SAY I
6 HAVE EYES BEHIND MY HEAD.

7 **MR. JACOBSON:** I ALWAYS TRY TO BE DISTRACTING BUT NOT
8 IN THAT WAY, YOUR HONOR. SO PLEASE ACCEPT MY APOLOGIES.

9 **THE COURT:** IT'S JACOBSON?

10 **MR. JACOBSON:** YOUR HONOR --

11 **THE COURT:** COUNSEL, LET ME GET YOUR NAME AGAIN,
12 PLEASE.

13 **MR. JACOBSON:** YES, JONATHAN JACOBSON.

14 **THE COURT:** JUST MAKING SURE.

15 **MR. JACOBSON:** IF I COULD START WITH A COUPLE OF
16 POINTS IN YOUR HONOR'S OPINION. YOU SAID FIRST AT PAGE 9, THE
17 CONSPIRACY IS AN ESSENTIAL ELEMENT OF EACH OF CASCADES'
18 CLAIMS. I'D ADD THAT THAT'S TRUE OF THE UNILATERAL CONDUCT
19 CLAIMS AGAINST RPX AS WELL BECAUSE UNLESS THE MANUFACTURING
20 DEFENDANTS HAVE CONSPIRED WITH RPX, THEN RPX CAN'T SPEAK TO
21 THEIR MARKET SHARE IN WHATEVER MARKET THE PLAINTIFF MAY BE
22 DEFINING. SO HAVING SOME CONSPIRACY, SOME AGREEMENT AMONG THE
23 MANUFACTURING DEFENDANTS IS ESSENTIAL TO EVERY ASPECT OF THE
24 CASE.

25 NOW YOUR HONOR ALSO -- FACED WITH THE COMPLAINT THAT

1 ALLEGED VERY CLEARLY MEMBERSHIP IN RPX, THE GOALS AND PURPOSES
2 OF RPX, AND THE FACT OF PARALLEL CONDUCT, YOUR HONOR HELD THAT
3 THOSE FACTS WERE INSUFFICIENT TO STATE A CLAIM UNDER TWOMBLY
4 AND KENDALL. AND, IN FACT, YOU SAID THAT THIS WAS THE SORT OF
5 GENERIC PLEADING ALLEGING MISCONDUCT AGAINST VARIOUS
6 DEFENDANTS WITHOUT SPECIFICS AS TO THE ROLE EACH PLAYED THAT
7 WAS REJECTED BY TWOMBLY. AND WE -- WE AGREE WITH THAT.

8 IF YOU LOOK AT THE NEW ALLEGATIONS, THE ONLY THING THAT IS
9 ALLEGED OF ANY SUBSTANCE IS THE STATEMENT BY MOTOROLA THAT,
10 QUOTE, IT WOULD LIKE TO RESOLVE THIS THROUGH RPX IN PARAGRAPH
11 32, BUT, IN FACT, THAT'S NOT NEW. THAT STATEMENT, WITHOUT THE
12 QUOTATION MARKS AROUND IT, IS IN FACT IN THE ORIGINAL
13 COMPLAINT. THAT'S WHAT WAS HERE BEFORE. THERE IS NOTHING IN
14 THAT STATEMENT I WOULD SAY, YOUR HONOR, THAT IS --

15 **THE COURT:** WELL, EXCEPT THAT I NOW HAVE A SPECIFIC
16 PERSON FROM A SPECIFIC COMPANY WHICH WAS NOT PREVIOUSLY
17 ALLEGED. AND I HAVE SPECIFIC CONDUCT FROM -- WHAT'S HIS
18 NAME -- OR AT LEAST A SPECIFIC ALLEGATIONS FROM --

19 **MR. NIRO:** MR. BARHYDT.

20 **THE COURT:** HOW DO I SAY THAT?

21 **MR. NIRO:** BARHYDT.

22 **THE COURT:** BARHYDT?

23 **MR. NIRO:** YES, YOUR HONOR.

24 (SIMULTANEOUS COLLOQUY.)

25 **THE COURT:** SO THAT IS DIFFERENT.

1 GO AHEAD.

2 **MR. JACOBSON:** IT'S DIFFERENT BUT NOT MATERIAL, YOUR
3 HONOR, NOT FOR PURPOSES OF TWOMBLY AND KENDALL. KENDALL HOLDS
4 AS SQUARELY AS A COURT CAN THAT ORGANIZATIONAL MEMBERSHIP IN
5 AN ORGANIZATION, WHOSE PURPOSE IN THAT CASE WAS TO FIX
6 INTERCHANGE RATES, IS NOT SUFFICIENT EVIDENCE OF CONSPIRACY
7 UNDER TWOMBLY TO GET PAST RULE 12.

8 PLAINTIFF -- CASCADES CAN'T DISTINGUISH THAT CASE AT ALL.
9 THE ONLY DISTINCTION IT MAKES IS THAT THERE WAS, QUOTE,
10 UNQUOTE, DISCOVERY IN THAT CASE. WELL, DISCOVERY CONSISTED OF
11 TWO DEPOSITIONS, A DEPOSITION OF --

12 **THE COURT:** IT PASSED -- WHAT WAS THE -- REMIND ME
13 WHAT WAS THE PROCEDURAL POSTURE?

14 **MR. JACOBSON:** IT WAS 12(B)(6). JUDGE WHITE GAVE
15 THEM TWO DEPOSITIONS BUT KEPT IT UNDER RULE 12(B)(6), AND THE
16 DECISION OF COURT OF APPEALS WAS ALSO UNDER 12(B)(6).

17 I WOULD ADD THAT IN TWOMBLY ITSELF, THERE WAS PLENTY OF
18 ORGANIZATIONAL MEMBERSHIP PLUS PARALLEL CONDUCT, PLUS THE
19 STATEMENT THAT THE ACTIONS WERE CONTRARY TO INDEPENDENT SELF
20 INTEREST, WHICH THE SUPREME COURT EXAMINED, AND SAID, AS -- AS
21 MR. DEVLIN POINTED OUT, THAT THIS IS EQUALLY CONSISTENT
22 WITH -- WITH UNILATERAL CONDUCT AS WITH CONSPIRACY.

23 THERE'S NOT A WORD IN HERE ABOUT ANYTHING THAT SAMSUNG
24 DID. THERE'S NOT A WORD IN HERE ABOUT ANYTHING THAT HTC DID.
25 THE STATEMENT ATTRIBUTABLE TO MOTOROLA, ALTHOUGH IT'S MORE

1 SPECIFIC, IS THAT THEY WOULD LIKE TO RESOLVE THIS THROUGH RPX.
2 THAT'S NOT PROBATIVE OF CONSPIRACY AT ALL.

3 NOW, I DO WANT TO JUST SIT BACK A SECOND AND CLARIFY
4 WHAT -- WHAT A HUB-AND-SPOKE CONSPIRACY IS.

5 AND I THINK YOUR HONOR, IF YOUR HONOR HAS THE ANTITRUST
6 LAW DEVELOPMENTS TREATISE, IT'S SET FORTH THERE WELL. WE HAVE
7 A DISCUSSION OF HORIZONTAL AND A DISCUSSION OF VERTICAL
8 FOLLOWED BY A DISCUSSION OF HUB AND SPOKE, WHICH IS SORT OF A
9 HYBRID BETWEEN THE TWO. BUT THE CENTERPIECE OF ANY
10 HUB-AND-SPOKE CONSPIRACY IS A CONSPIRACY AMONG (SIC) THE RIM.
11 THERE MUST BE A RIM. THE SPOKES MUST CONSPIRE AMONG
12 THEMSELVES, AND THAT'S WHAT'S MISSING HERE.

13 NOTHING IN TOYS "R" US, NOTHING IN INTERSTATE CIRCUIT
14 SUGGESTS THE CONTRARY.

15 NOW, INTERSTATE CIRCUIT IS -- IS OCCASIONALLY READ AS --
16 AS HAVING GONE OUT ON A LIMB IN TERMS OF WHAT'S NECESSARY TO
17 PROVE A CONSPIRACY. BUT IF YOU LOOK AT JUSTICE STONE'S
18 OPINION, YOUR HONOR, YOU'LL SEE THAT THERE WAS THE LETTER FROM
19 INTERSTATE CIRCUIT TO THE EIGHT DISTRIBUTORS ASKING THEM TO
20 RAISE THE PRICE ON SECOND-RUN FILMS. ALL OF THEM COMPLIED.

21 AT THIS POINT, WE HAVE UNILATERAL CONDUCT PLUS A LETTER
22 CIRCULATED AMONG ALL OF THEM THAT ALL OF THEM KNEW ABOUT. BUT
23 WHAT TURNED THE TIDE IN THAT CASE WAS THAT THEY EACH AGREED,
24 EXCEPT FOR AUSTIN AND THE RIO GRANDE, WHICH HAD NOTHING TO DO
25 WITH WHAT WAS IN THE LETTER. IT WAS THE TYPE OF CONDUCT

1 THAT'S REFERRED TO IN FOOTNOTE 4 OF TWOMBLY AS EXPLICABLE ONLY
2 HAD THERE BEEN A CONSPIRACY IN FACT AMONG THE EXHIBITORS WHO
3 CONSTITUTED THE SPOKES AND A -- AN AGREEMENT AMONG THEM WOULD
4 BE THE RIM.

5 THERE'S NOTHING IN INTERSTATE CIRCUIT, THERE'S NOTHING IN
6 TOYS "R" US THAT CONTRADICTS THE CASES SUCH AS PEPSICO THAT WE
7 CITE IN THE BRIEF THAT SAY THERE MUST BE, IN FACT, BE AN
8 AGREEMENT AMONG THE COMPANIES CONSTITUTING THE SPOKES FOR
9 THERE TO BE AN ACTIONABLE CONSPIRACY. AND THAT -- THAT IS
10 SIMPLY WHAT'S MISSING HERE.

11 AND, IN FACT, IN THEIR BRIEF, YOUR HONOR, AT PAGE 14,
12 CASCADES MAKES CLEAR THAT IT IS ARGUING THAT ORGANIZATIONAL
13 MEMBERSHIP PLUS PARALLEL CONDUCT IS ENOUGH. THEY SAY THAT
14 IN -- IN PRECISELY THOSE WORDS, YOUR HONOR. AND THE RATIONALE
15 IS THAT, WELL, THAT -- THE PURPOSE OF RPX IS TO NEGOTIATE ON
16 BEHALF OF ITS MEMBERS.

17 AGAIN, YOUR HONOR, THOSE ARE THE PRECISE SAME FACTS AS IN
18 KENDALL. IN KENDALL, THE DEFENDANT BANKS WERE ACTUALLY
19 MEMBERS OF THE BOARD OF DIRECTORS OF VISA AND MASTERCARD, A
20 FACT WHICH IS NOT PRESENT HERE. AND YET, THOSE
21 ORGANIZATIONS -- THE WHOLE PURPOSE OF VISA AND MASTERCARD IS
22 TO SET UP A CONSORTIUM THAT ALLOWS THE SETTING OF AN
23 INTERCHANGE RATE, AND THAT WAS THE CONSPIRACY ALLEGED IN THE
24 COMPLAINT.

25 NOTWITHSTANDING THAT THAT WAS THE PURPOSE OF THE

1 ORGANIZATION AND SIMILAR TO WHAT CASCADES IS ALLEGING HERE,
2 THE COURT OF APPEALS FOUND IT LEGALLY INSUFFICIENT TO FIND
3 THAT THERE WAS A CONSPIRACY AMONG THE BANKS TO SET THE
4 INTERCHANGE RATES.

5 AND KENDALL IS A RULE 12 DECISION. WE BELIEVE IT IS AS ON
6 POINT AS ONE CAN GET AND IS, IN FACT, DISPOSITIVE HERE.

7 **THE COURT:** RESPONSE, MR. NIRO, ON THAT?

8 **MR. NIRO:** YES, YOUR HONOR. THE GSI CASE, WHICH
9 FOLLOWED KENDALL, WHICH IS A DISTRICT COURT CASE, I THINK
10 IS -- IS AS CLOSE TO BEING THIS CASE AS YOU CAN HAVE.

11 THERE, THE DISTRICT COURT, WHICH WAS THE -- THIS -- THIS
12 DISTRICT, FOUND THAT THE STANDARD --

13 **THE COURT:** WHO IS THE JUDGE?

14 **MR. NIRO:** JUDGE FROM SAN JOSE WHOSE NAME ESCAPES ME
15 AT THE MOMENT. I THINK DAVILA?

16 **THE COURT:** DAVILA?

17 **MR. NIRO:** YES. YES. I BELIEVE THAT'S RIGHT, YOUR
18 HONOR. IT WAS DECIDED IN JULY OF 2012, I BELIEVE.

19 AND IN GSI, THE COURT MADE CLEAR IN DENYING A -- A MOTION
20 UNDER 12(B)(6) THAT THE APPROPRIATE LEGAL STANDARD IS NOT THE
21 PROBABILITY OF A CONSPIRACY. IT IS, ARE THERE SUFFICIENT
22 FACTS ALLEGED TO CREATE A REASONABLE EXPECTATION THAT
23 DISCOVERY WILL REVEAL IMPROPER CONDUCT? THAT'S THE STANDARD.
24 IT'S NOT EVEN --

25 **THE COURT:** WELL, THAT'S -- IS THAT REALLY THE

1 STANDARD?

2 MR. NIRO: THAT'S EXACTLY WHAT GSI SAYS.

3 THE COURT: I KNOW THAT'S WHAT IT SAYS.

4 (SIMULTANEOUS COLLOQUY.)

5 THE COURT: BUT IS THAT THE STANDARD?

6 (SIMULTANEOUS COLLOQUY.)

7 THE COURT: YOU GO BACK TO IQBAL AND TWOMBLY.

8 MR. NIRO: YES.

9 THE COURT: AND THOSE ARE ANTITRUST CASES DECIDED BY
10 THE SUPREME COURT WHICH INDICATES THE DISTRICT COURT IS THE
11 GATEKEEPER FUNDAMENTALLY. FUNDAMENTALLY.

12 MR. NIRO: I AGREE.

13 THE COURT: IT IS A DIFFERENT STANDARD --

14 (SIMULTANEOUS COLLOQUY.)

15 THE COURT: -- THAN THE NORMAL -- THAN THE NORMAL
16 CASE. I MEAN, THERE ARE MANY PEOPLE WHO ARGUE THAT IT
17 SHOULDN'T HAVE BEEN EXTENDED TO ALL OF THESE OTHER CASES. WE
18 WOULDN'T HAVE SO MUCH WORK IN THE DISTRICT COURT.

19 BUT -- BUT THERE IS NO ESCAPING THAT THOSE WERE THE -- IN
20 AN ANTITRUST CONTEXT.

21 MR. NIRO: WE AGREE, BUT IT DIDN'T CREATE A STANDARD
22 AT THE LEVEL THESE FOLKS ARE -- ARE SUGGESTING. KENDALL WAS
23 QUOTED IN GSI AS BEING THE APPROPRIATE STANDARD. KENDALL
24 SAID -- ALTHOUGH IT WENT THE OTHER WAY, KENDALL SAID THAT THE
25 STANDARD IS, IN FACT, ARE THERE SUFFICIENT FACTS THAT ARE PLED

1 TO CREATE A REASONABLE EXPECTATION THAT DISCOVERY WILL REVEAL
2 THE IMPROPER CONDUCT?

3 THE COURT IN GSI QUOTED KENDALL, WHICH IN TURN RELIED UPON
4 THE TWOMBLY CASE. THERE'S NO QUESTION YOUR HONOR'S RIGHT.

5 **THE COURT:** ALL RIGHT.

6 MR. JACOBSON?

7 **MR. NIRO:** A HIGHER STANDARD EXISTS FOR ANTITRUST --

8 **THE COURT:** MR. JACOBSON --

9 **MR. NIRO:** -- MET IT HERE.

10 **THE COURT:** -- ON THAT POINT.

11 **MR. NIRO:** I'M SORRY, YOUR HONOR.

12 **MR. JACOBSON:** THE GSI CASE, YOUR HONOR, IS A SIMPLE
13 CARTEL. THERE WAS A GRAND JURY, IN FACT, CONVENED TO
14 INVESTIGATE THE -- THE ALLEGATIONS THERE. THERE'S ALL SORT OF
15 HORIZONTAL ACTIVITY IN THE GSI CASE. NO ONE WOULD EVER
16 SUGGEST THAT IT'S A SIMPLE PARALLEL CONDUCT PLUS
17 ORGANIZATIONAL MEMBERSHIP CASE. I'M NOT -- I DON'T EVEN
18 BELIEVE THERE WAS AN ORGANIZATION AT ISSUE IN THE -- IN THE
19 GSI CASE.

20 YOUR -- YOUR HONOR, THE -- THE STATEMENT OF -- IN THE
21 ABSTRACT, IS THERE ENOUGH HERE TO THINK THAT DISCOVERY MIGHT
22 GIVE US AN ACTUAL CASE, IS AT ITS CORE PRECISELY AS YOUR HONOR
23 INDICATED WHAT TWOMBLY SAID "NO" TO.

24 IN -- IN TWOMBLY, ITSELF, WE HAVE ALL OF THE TELEPHONE
25 COMPANIES NOT COMPETING IN ANY SORT OF LOOSE TERRITORIES. WE

1 HAVE ALL THE TELEPHONE COMPANIES, MEMBERS OF A NUMBER OF
2 ORGANIZATIONS. THEY HAVE MEETINGS TOGETHER. THAT WOULD MEET
3 THE STANDARD THAT CASCADES IS ADVOCATING HERE.

4 BUT TWOMBLY SAID THERE NEEDS TO BE SOMETHING MORE TO
5 UNDERGO THE ENORMOUS EXPENSE THAT ANTITRUST DISCOVERY ENTAILS.
6 AND THEY DIDN'T LIMIT IT TO ANTITRUST, BUT ANTITRUST WAS THE
7 FOCUS THERE. WE HAVE TO HAVE SOMETHING MORE, SOMETHING THAT
8 TELLS US NOT THAT IT'S NECESSARILY PROBABLE -- THIS IS NOT A
9 PROBABILITY STANDARD -- BUT THAT IT'S PLAUSIBLE.

10 AND THEY SAID THE PARALLEL CONDUCT ALONE DOES NOT CROSS
11 THE LINE SUFFICIENTLY FROM -- FROM POSSIBILITY TO
12 PLAUSIBILITY. AND THAT'S WHY WE'RE NOT GOING TO REQUIRE THESE
13 DEFENDANTS TO SPEND MILLIONS AND MILLIONS OF DOLLARS IN THE
14 HOPE THAT SOMETHING MAY TURN UP.

15 **THE COURT:** ALL RIGHT. LET'S MOVE TO
16 *NOERR-PENNINGTON*.

17 CAN I EVEN DECIDE THAT GIVEN THE STATE OF THE COMPLAINT ON
18 A 12(B)(6)? ISN'T THAT REALLY SOMETHING I WOULD HAVE TO DO IN
19 THE CONTEXT OF SUMMARY JUDGMENT.

20 **MR. JACOBSON:** YOUR HONOR COULD DO IT IN THE CONTEXT
21 OF SUMMARY JUDGMENT. THIS IS THE DISCUSSION THAT -- THAT WE
22 HAD THE LAST TIME, BUT SINCE THEN, THERE HAS BEEN SOME CLARITY
23 ADDED TO THE COMPLAINT IN TERMS OF THE *NOERR-PENNINGTON* FACTS.
24 AND WE KNOW THERE WAS SOME ACTIVITY BY RPX IN ADVANCE OF THE
25 LITIGATION.

1 BUT EVERYTHING ALLEGED AGAINST THE MANUFACTURING
2 DEFENDANTS WHO ARE NECESSARY TO ANY CLAIM AGAINST RPX FOR THE
3 REASONS I EXPLAINED -- EVERYTHING ABOUT THEM IS POST-FILING OF
4 THE LITIGATION. IT'S ON THE FACE OF THE COMPLAINT. AND THERE
5 ARE A NUMBER OF CASES IN THIS CIRCUIT -- YOUR HONOR IS
6 FAMILIAR WITH THE SOSA AGAINST DIRECTTV CASE, WHICH IS A RULE
7 12(B)(6) CASE; THE FREEMAN AGAINST LASKY CASE, WHICH IS A RULE
8 12(B)(6) CASE; THAT SAY, YES, WHERE THE COMPLAINT MAKES CLEAR
9 THAT THE ALLEGATIONS INTRUDE ON THE RIGHT TO PETITION THE
10 COURTS EITHER FOR A DEFENSIVE JUDGMENT OR AN OFFENSIVE
11 JUDGMENT, THAT THAT IS BARRED BY *NOERR-PENNINGTON* AND IS
12 COGNIZABLE ON A MOTION UNDER RULE 12(B)(6).

13 SO YES, I THINK THERE IS -- THERE IS ENOUGH HERE. WE
14 HONESTLY THOUGHT THERE WAS ENOUGH IN THE INITIAL COMPLAINT.
15 YOU DENIED OUR MOTION IN THAT RESPECT WITHOUT PREJUDICE. BUT
16 WE THINK NOW THAT IT'S SO CLEAR FROM THE COMPLAINT THAT THE
17 ONLY ACTIVITY ANTEDATING THE LITIGATION WAS WITH RPX, THAT
18 THERE IS -- THERE IS AMPLE BASIS TO DISMISS THE CASE ON
19 *NOERR-PENNINGTON* GROUNDS.

20 **THE COURT:** MR. NIRO?

21 **MR. NIRO:** YOUR HONOR, I THINK YOUR INITIAL REACTION
22 IS THE CORRECT ONE. THAT'S A SUMMARY JUDGMENT ISSUE.
23 PARAGRAPHS 101 THROUGH 107 OF THE AMENDED COMPLAINT NOW SET
24 FORTH A CHRONOLOGY OF THE KEY EVENTS IN THE *NOERR-PENNINGTON*
25 DOCTRINE, AND THEY ESTABLISH, IF TRUE, THAT THE CRITICAL ACTS

1 TOOK PLACE BEFORE ANY LITIGATION; THAT IS, THE PLAN WAS PUT IN
2 PLACE TO USE RPX AS A -- AS A GROUP OF -- OF PURCHASERS TO
3 CREATE A BUYER CARTEL. AND THAT WAS DONE BEFORE THE
4 ORGANIZATIONAL STRUCTURE AND THE ACTUAL AGREEMENTS TOOK PLACE
5 BEFORE.

6 NOW, THEY CAN SAY NO, THAT'S NOT SO, BUT I THINK DISCOVERY
7 WILL SHOW THAT, INDEED, THAT WAS SO, BECAUSE MR. BARHYDT IS
8 NEGOTIATING ON BEHALF OF THE MEMBERS WELL IN ADVANCE OF ANY
9 LAWSUIT BEING FILED. HE ADMITTED THAT.

10 **THE COURT:** SO YOU CONCEDE THAT YOU DON'T HAVE ANY
11 ALLEGATIONS SPECIFIC TO THE MANUFACTURING DEFENDANTS BEFORE
12 THE FILING OF THE PATENT INFRINGEMENT CASE, THAT IT ALL
13 HINGES -- I JUST WANT TO MAKE SURE I UNDERSTAND -- IT ALL
14 HINGES ON THE FACT THAT IT IS RPX ACTING ON BEHALF OF THE
15 MANUFACTURING DEFENDANTS.

16 AM I UNDERSTANDING YOUR ARGUMENT CORRECTLY?

17 **MR. NIRO:** THAT'S -- THAT'S CORRECT. WE DO NOT HAVE
18 THE DISCOVERY NECESSARY TO SHOW AN ACTUAL MEETING TAKING PLACE
19 BEFORE THE FILING OF THE LAWSUITS. HOWEVER, WHAT WE DO HAVE
20 IS CONSIDERABLE ACTION AND ACTIVITIES BY RPX ON BEHALF OF THE
21 MANUFACTURING DEFENDANTS AT THIS EARLY STAGE. THEY HAVE THE
22 STRUCTURE IN PLACE. THEY WERE RAISING THE MONEY. THEY HAD
23 MEETINGS TO DISCUSS THE PLAN ON EXACTLY HOW THEY WERE GOING TO
24 DO THIS.

25 AND WHAT THEY DID IS THEY FLAT OUT SAID WE DON'T CARE WHAT

1 YOU OFFER, WE'RE NOT GOING TO TALK EXCEPT THROUGH RPX. AND
2 THAT'S THE BUYER CARTEL. THAT'S THE HORIZONTAL ARRANGEMENT.
3 AND WHAT MIGHT -- MIGHT NOTE IN THAT REGARD THAT THE
4 INTERSTATE CIRCUIT CASE SAID VERY CLEARLY THAT YOU CAN INFER
5 THE EXISTENCE OF A HORIZONTAL CONSPIRACY IF THE -- THE SPOKES
6 ENGAGE IN CONDUCT -- THAT'S THE MANUFACTURING DEFENDANTS --
7 ENGAGE IN CONDUCT THAT'S CONTRARY TO THEIR OWN INDEPENDENT
8 BEST INTERESTS.

9 AND I HAVE TO SAY AS THE PERSON WHO OFFERED THE \$5 MILLION
10 WITH THAT PAYBACK REBATE ARRANGEMENT THAT IT WAS SHOCKING THAT
11 NOT ONE OF THE MANUFACTURING DEFENDANTS EVEN CAME BACK AND
12 SAID WE WILL CONSIDER THAT.

13 I NEGOTIATED AGREEMENTS WITH BOTH SAMSUNG AND MOTOROLA IN
14 WHICH THEY GOT A HUNDRED PERCENT OF THEIR MONEY BACK. THAT'S
15 A ZERO ROYALTY POTENTIAL. IT'S SOMETHING THAT PEOPLE THAT
16 AREN'T ENGAGED IN ACTIONS THAT ARE CONTRARY TO THEIR OWN
17 SELF-INTEREST WOULD JUMP ON. THEY DIDN'T.

18 THERE, YOU HAVE ACTING IN -- IN A WAY THAT'S CONTRARY TO
19 SELF-INTEREST. AND THAT'S THE CRITICAL COMPONENT FROM WHICH
20 YOU INFER A HORIZONTAL TACIT AGREEMENT. THAT'S WHAT -- THAT'S
21 WHAT INTERSTATE CIRCUIT SAYS. AND THAT'S EXACTLY WHAT APPLIES
22 HERE.

23 **THE COURT:** MR. JACOBSON?

24 **MR. JACOBSON:** JUST -- JUST BRIEFLY. YOUR HONOR HAS
25 ALREADY REJECTED THAT -- THAT ARGUMENT IN -- IN YOUR INITIAL

1 DECISION, AND THERE ARE NO FACTS THAT -- THAT CHANGE THE
2 ANALOGIES THAT YOUR HONOR MADE. WE'VE -- WE'VE EXPLAINED WHY
3 THE MATH IS SUCH THAT \$5 MILLION IS -- IS AN AWFUL LOT OF
4 MONEY WHEN THERE IS ALSO A NEGOTIATION FOR A LICENSE ON BEHALF
5 OF THE ENTIRETY OF RPX'S MEMBERSHIP FOR \$10 MILLION AND THAT
6 THE PROSPECT OF -- OF REDUCING THE \$5 MILLION THROUGH MORE
7 LITIGATION BY CASCADES WAS ONE THAT IS, AT BEST, SPECULATIVE
8 AND ONE WHICH ANY RATIONAL PERSON WHO WOULD -- WOULD LOOK --
9 LOOK HARD AT BEFORE -- BEFORE ACCEPTING, JUST AS -- JUST AS
10 YOUR HONOR SAID.

11 IN TERMS OF THE -- OF THE ACTIVITY BEFORE THE LITIGATION,
12 I DO WANT TO MAKE ONE OTHER POINT, WHICH IS THAT A CAUSE OF
13 ACTION IN ANTITRUST DOES NOT ACCRUE -- THE CAUSE OF ACTION
14 DOES NOT EXIST UNTIL INJURY OCCURS. NO INJURY IS ALLEGED BY
15 CASCADES UNTIL AFTER THE LITIGATION HAD BEGAN WHEN THIS
16 BECAME, AS I THINK WE'VE DESCRIBED IT IN OTHER CONTEXTS, AS AN
17 ARGUMENT OF CONSPIRACY NOT TO SETTLE. CONSPIRACY NOT TO
18 SETTLE IS SPECIFICALLY PROTECTED BY THE NINTH CIRCUIT'S
19 DECISION IN COLUMBIA AGAINST PRE.

20 **MR. NIRO:** YOUR HONOR, I WOULD NOTE IT'S NOT A
21 CONSPIRACY NOT TO SETTLE. IT'S A CONSPIRACY NOT TO NEGOTIATE
22 A LICENSE THAT PRECEDED ANY --

23 **THE COURT:** WHAT ABOUT THE --

24 (SIMULTANEOUS COLLOQUY.)

25 **THE COURT:** WHAT ABOUT THE ISSUE OF INJURY?

1 **MR. NIRO:** THE INJURY OCCURS WHEN THE CONSPIRACY
2 BEGINS, WHEN THE -- WHEN THE REFUSAL TO NEGOTIATE LICENSE
3 TERMS IN THE RELEVANT MARKET EXISTS. THAT'S WHEN THE INJURY
4 OCCURS, AND THAT'S MADE CLEAR IN THE -- IN THE SPECIFICATION
5 AGAIN IN -- THE AMENDED COMPLAINT SPECIFIES THE BASIS FOR
6 INJURY TO COMPETITION AND INJURY TO CASCADES. AND THAT'S IN
7 PARAGRAPHS 95 THROUGH 97, INJURY TO COMPETITION IN '98, '99.
8 I'M SORRY.

9 **THE COURT:** DO YOU HAVE ANY CASE LAW WITH RESPECT TO
10 THE NATURE OR KIND OF INJURY FOR FAILURE TO NEGOTIATE. I
11 MEAN, INJURY HAS TO BE RELATIVELY CERTAIN. IT CAN'T BE
12 SPECULATIVE.

13 **MR. NIRO:** RIGHT.

14 **THE COURT:** AND HERE, IT'S SOMEWHAT AMORPHOUS BECAUSE
15 YOU'RE CLAIMING THAT YOUR INJURY IS A FAILURE TO NEGOTIATE.
16 IT WOULD BE ONE THING IF IT WAS MILK PRODUCT, AND WE COULD
17 HAVE -- AGAIN, THIS GOES BACK TO THE ISSUE OF -- OF WHAT'S
18 BEING NEGOTIATED, RIGHT?

19 IF IT WAS MILK PRODUCT, WE WOULD HAVE A LOT OF EVIDENCE
20 ABOUT WHAT WOULD BE AN APPROPRIATE PRICE WHEN YOU WERE -- WHEN
21 A -- WHEN A SELLER WAS SOMEHOW BLOCKED OUT BY BUYERS. HERE,
22 BECAUSE IT IS A UNIQUE ITEM AND THERE IS NO PRICE BUT FOR THE
23 NEGOTIATION, HOW -- ANY LAW?

24 **MR. NIRO:** THERE -- THERE IS LAW ON CONCERTED
25 REFUSALS TO DEAL IN THE CONTEXT OF LICENSING DATING ALL THE

1 WAY BACK TO THE JONES KNITTING CASE OUT OF THE EASTERN
2 DISTRICT OF PENNSYLVANIA. I THINK WE CITED SOME OF THOSE
3 CASES, MAYBE ALL OF THOSE CASES, IN THE INITIAL ROUND OF
4 BRIEFING ON THIS.

5 BUT IN ESSENCE, IT'S THIS, INJURY TO COMPETITION TAKES
6 PLACE IN THE CONTEXT OF THESE LICENSING THINGS IN THAT YOU ARE
7 DOING A COUPLE OF THINGS. YOU'RE -- YOU'RE CAUSING INJURY TO
8 THE -- THE PATENT OWNER BECAUSE THE PATENT OWNER NOW HAS TO
9 SPEND MONEY IN LITIGATION, INCUR THOSE KINDS OF EXPENSES, AND
10 DOESN'T HAVE THE ABILITY TO LICENSE THE TECHNOLOGY AT THE
11 APPROPRIATE FREE MARKET RATE.

12 YOU'RE RIGHT. WHAT THAT NUMBER IS IS -- IS DEPENDENT UPON
13 WHAT HAPPENS IN THE NEGOTIATION, BUT THERE ARE SOME -- SOME --
14 SOME POINTS THAT CAN BE DISCUSSED HERE. FOR EXAMPLE, THE --
15 THE 800,000 PAID FOR A 4 PERCENT PROJECTS THE 20 MILLION. YOU
16 COULD SAY AT LEAST 20 MILLION, MAYBE MORE.

17 THERE WERE EARLIER COMMUNICATIONS WHEN RPX SAID, WELL,
18 WHAT DO YOU THINK THIS IS WORTH? WHERE CASCADE SAID PROBABLY
19 AT LEAST 50 MILLION. SO THERE ARE SOME -- SOME BENCHMARKS
20 HERE. BUT THE INJURY TO COMPETITION -- AND THIS IS AN
21 IMPORTANT POINT, I THINK THAT YOU HAVE TO REALIZE -- THE COURT
22 SHOULD REALIZE IS TO INVENTION --

23 **THE COURT:** ISN'T THAT INCREDIBLY BROAD? THAT'S LIKE
24 SAYING, YOU KNOW, IT COULD BE THE -- ALL CONSUMER PRODUCTS. I
25 MEAN, THAT IS -- THERE IS NO WAY TO GET YOUR ARMS AROUND THAT

1 KIND OF ARGUMENT.

2 MR. NIRO: I -- I DISAGREE, YOUR HONOR. YOU CAN GET
3 YOUR ARMS AROUND IT BECAUSE --

4 THE COURT: THEN DO I NEED TO HAVE YOU GO BACK AND
5 AGAIN SPECIFY WHAT THE MARKET IS? IS THE MARKET ALL
6 INVENTORS' PATENTS? IS THE MARKET THE '750 AND ITS
7 ACCOMPANYING COLLECTION? IS IT -- THEN -- THEN WHAT IS IT? I
8 THOUGHT WE WERE MAKING PROGRESS; PERHAPS WE'RE NOT.

9 MR. NIRO: NO, I THINK WE'RE MAKING PROGRESS. THE
10 MARKET IS AS WE DEFINE IT. THERE'S A MARKET FOR THE '750
11 PATENT -- AND BECAUSE THE MANUFACTURING DEFENDANTS THROUGH RPX
12 SAID, WELL, WE WANT EVERYTHING. THAT'S THE BROADER MARKET.
13 BUT THE -- THE SUBMARKET AND THE CORRECT SUBMARKET IS FOR
14 LICENSES UNDER THE '750 PATENT, AND THAT'S THE ANDROID-BASED
15 SYSTEMS, AND THAT'S THE MARKET IN WHICH THEY DOMINATE.

16 THE INJURY TO COMPETITION IS THE POINT I WAS TRYING TO
17 MAKE. THAT'S NOT -- THAT'S NOT THE SPECIFIC INJURY TO -- TO
18 CASCADES. IT'S INJURY TO COMPETITION. BECAUSE IF INVENTORS
19 CAN'T LICENSE THEIR PATENTS, THEY DON'T HAVE AN INCENTIVE TO
20 INVENT. AND IF THEY DON'T HAVE AN INCENTIVE TO INVENT, THEN
21 THAT INJURES COMPETITION, THAT INJURES THE PUBLIC. THAT'S THE
22 POINT I THINK THAT -- THAT WE WANTED TO MAKE AS ONE OF THE
23 ITEMS -- ONE OF THE ELEMENTS OF INJURY THAT OCCURS THROUGH
24 THIS TYPE OF BUYER BOYCOTT.

25 IT ISN'T JUST SPECIFIC TO -- TO CASCADES.

1 **THE COURT:** YOU KNOW, I HAVE TO SAY, THERE'S A LOT OF
2 LITERATURE ABOUT OUT THERE ABOUT HOW PATENT LITIGATION INJURES
3 THE MARKETS.

4 **MR. NIRO:** WELL, CAN I ADDRESS THAT?

5 **THE COURT:** I'M GOING TO LET MR. JACOBSON RESPOND,
6 AND THEN YOU CAN ADDRESS IT.

7 **MR. NIRO:** OKAY.

8 **MR. JACOBSON:** YOUR HONOR, I'LL BE VERY BRIEF, WHICH
9 IS THAT INJURY TO COMPETITION -- ALTHOUGH I DISAGREE WITH
10 PRETTY MUCH EVERY SYLLABLE THAT WAS SAID, WE DON'T EVEN NEED
11 TO ADDRESS THAT BECAUSE COUNSEL CONCEDED THAT INJURY TO
12 CASCADES CAME AFTERWARDS. AND A PRIVATE CAUSE OF ACTION UNDER
13 SECTION 4 OF THE CLAYTON ACT DOES NOT ACCRUE UNTIL INJURY TO
14 THAT PLAINTIFF HAS OCCURRED. THERE'S NO CAUSE OF ACTION.

15 **THE COURT:** WELL, HE DIDN'T CONCEDE.

16 **MR. JACOBSON:** HE DID JUST NOW.

17 **THE COURT:** HOW DID HE CONCEDE THAT?

18 **MR. JACOBSON:** BUT WHOLLY APART FROM THAT, WHETHER HE
19 CONCEDED OR NOT, YOUR HONOR, THE COMPLAINT IS AS CLEAR AS CAN
20 BE THAT THERE IS NO INJURY TO CASCADES UNTIL AT THE VERY
21 EARLIEST, A FAILURE OF THE RPX NEGOTIATIONS IN OCTOBER 2011
22 WHICH IS POST-LITIGATION ACTIVITY. THERE IS NO INJURY TO
23 CASCADES PRIOR TO LITIGATION HAVING BEEN COMMENCED, AND THAT'S
24 WHAT'S DISPOSITIVE, YOUR HONOR, UNDER *NOERR-PENNINGTON* ON THE
25 FACE OF THE COMPLAINT.

1 **THE COURT:** OKAY. MR. NIRO, YOU WANTED TO SAY
2 SOMETHING?

3 **MR. NIRO:** YES, YOUR HONOR, TO ADDRESS THIS NPE
4 PATENT -- BUSINESS. THE FACT OF THE MATTER IS THAT A
5 COLLECTION OF COMPANIES LIKE CISCO AND OTHERS HAVE MADE A BIG
6 DEAL OUT OF \$29 BILLION COMING OUT OF THE ECONOMY AS A
7 CONSEQUENCE OF NPE LITIGATION. THAT DATA GOES TO THE
8 UNIVERSITY OF BOSTON PROFESSOR -- WRITES AN ARTICLE THAT SAYS
9 THERE'S 29 BILLION. THAT DATA, WHEN YOU TRACE IT, IS FROM
10 RPX, AND THEY INCLUDE IN THE DATA UNIVERSITIES. IS THAT -- IS
11 THAT BAD, THAT UNIVERSITIES BRING LAWSUITS TO ENFORCE THEIR
12 PATENTS?

13 INDIVIDUAL INVENTORS WHICH CONSTITUTES, ACCORDING TO
14 STUDIES THAT WE'VE SEEN, 57 PERCENT OF ALL THE COMPANIES THAT
15 THEY CHARGE WITH BEING NPE TROLLS ARE OWNED AND CONTROLLED BY
16 INVENTORS. THE WRIGHT BROTHERS DIDN'T HAVE THE ABILITY AND
17 RESOURCES TO COMMERCIALIZE AN AIRPLANE. THEY HAD PATENTS.
18 AND WHEN CURTISS COPIED THEIR INVENTIONS, THEY HAD TO LITIGATE
19 FOR SEVEN YEARS IN ORDER TO GET A LICENSE FROM CURTISS.

20 **THE COURT:** RIGHT, BUT WHEN YOU STARTED PRACTICING --
21 HOW LONG -- I MEAN, BOTH OF YOU HAVE BEEN PRACTICING HOW LONG?

22 (SIMULTANEOUS COLLOQUY.)

23 **THE COURT:** WHEN YOU STARTED PRACTICING, RIGHT, DID
24 ANYONE EVER SAY, HEY, I SHOULD GO INTO PATENT LITIGATION
25 BECAUSE THAT'S THE HOT TICKET? NO, THIS HAS BEEN A NEW

1 CREATION IN AMERICA FOR -- AND I HAVEN'T STUDIED THE HISTORY
2 OF IT. ONE DAY WHEN I -- MY DOCKET'S A LITTLE LIGHTER, I PLAN
3 ON DOING THAT. IT'S ON MY LIST OF THINGS TO DO. BUT THIS IS
4 A RELATIVELY NEW CREATION.

5 **MR. NIRO:** I'VE LIVED IT. I WAS AN ENGINEER THAT
6 WENT TO LAW SCHOOL, GEORGE WASHINGTON UNIVERSITY, WHERE A LOT
7 OF PATENT PEOPLE CAME FROM. AND WHEN WE CAME OUT, THEY
8 CONSIDERED PATENT ATTORNEYS -- "THEY" BEING THE BIG FIRMS --
9 CONSIDERED PATENT ATTORNEYS TO BE ODD DUCKS. THEY HAD SLIDE
10 RULES ON THEIR BELT. THEY USED COMPUTERS. THEY WERE CRAZY
11 GUYS.

12 ONLY WHEN IN 1982 THE FEDERAL CIRCUIT CAME INTO BEING AND
13 JUDGE MARKEY WHO HAPPENED TO BE FROM CHICAGO, IS A CHIEF JUDGE
14 OF THE FEDERAL CIRCUIT, STARTED TO SAY TO DISTRICT COURTS,
15 HEY, YOU KNOW, PATENTS ARE IMPORTANT, AND DAMAGES CAN BE
16 SIGNIFICANT. AND NOW DAMAGE AWARDS INCREASE. AND THEN ALL OF
17 A SUDDEN, THE FLOOD GATES OPEN.

18 WHEN I WENT INTO THE BUSINESS, THERE WERE ONLY SMALL
19 BOUTIQUE FIRMS LIKE OUR FIRM THAT DID PATENT WORK. AND ALL OF
20 THE PEOPLE WERE ENGINEERS OR SCIENTISTS OF SOME KIND THAT
21 HAPPENED TO GO TO LAW SCHOOL. THAT CHANGED.

22 NOW, BECAUSE OF THE SIGNIFICANT AWARDS, YOU HAVE THE MAJOR
23 LAW FIRMS NOW IN -- AND THAT'S CHANGED THE WHOLE DYNAMIC. NO
24 QUESTION ABOUT IT.

25 I'VE LIVED IT. I'VE SEEN IT. IT'S AN INTERESTING

1 SUBJECT.

2 **THE COURT:** IT IS.

3 ALL RIGHT, GENTLEMEN. HAVEN'T DECIDED. SUBMITTED?

4 **MR. NIRO:** THANK YOU, YOUR HONOR.

5 **THE COURT:** SUBMITTED.

6 **MR. JACOBSON:** NOTHING FURTHER, YOUR HONOR. THANK
7 YOU FOR YOUR TIME.

8 **THE COURT:** COUNSEL?

9 **MR. NIRO:** THANK YOU, YOUR HONOR.

10 **MR. DEVLIN:** THANK YOU VERY MUCH, YOUR HONOR.

11 I WAS -- ONLY JUST MAKE ONE FINAL NOTE, WHICH IS I KNOW
12 THAT YOU AND YOUR CLERKS HAVE SOME THINKING TO DO AND -- IN
13 REVIEWING THIS. BUT I REALLY ENCOURAGE YOU TO THINK THAT, IS
14 THERE ANYTHING MORE THAN JUST PARALLEL CONDUCT? AND A NAKED
15 ASSERTION OF CONTRARY TO SELF-INTEREST IS INSUFFICIENT TO
16 CARRY THE DAY. AND WITH THAT BASIS, I'D ENCOURAGE YOU TO
17 DISMISS WITH PREJUDICE.

18 THANK YOU, YOUR HONOR.

19 **THE COURT:** THANK YOU. COUNSEL, THANK YOU.

20 (PROCEEDINGS WERE CONCLUDED AT 2:59 P.M.)

21 --000--

CERTIFICATE OF REPORTER

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT
FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR, RELATED TO,
NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTION IN WHICH THIS
HEARING WAS TAKEN, AND FURTHER THAT I AM NOT FINANCIALLY NOR
OTHERWISE INTERESTED IN THE OUTCOME OF THE ACTION.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR

MONDAY, JUNE 3, 2013